SUBJECT INDEX

Page

Opinions Below 2

Grounds for Jurisdiction in This Court 3

Constitutional Provisions and Statutes Involved 3

Questions Presented 4

Statement of the Case 6

(a) Basis for Federal Jurisdiction in First Instance 6

(b) Summary of Proceedings Below 7

(c) The Facts Upon Which This Case Arose .. 9

Summary of Argument for Allowance of the Writ .. 13

Argument for Allowance of Writ 15

I.

The Board's "Perma-Vinyl Doctrine" Contravenes the Established Authority of This Court and of Several Courts of Appeals and Therefore Creates a Conflict on Important Issues of Law Which Must and Can Only Be Resolved by This Court 15

A. The Application of the Perma-Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cutoff Point of a Bona Fide Sale Conflicts Irreconcilably With Decisions of This Court and Principles of Due Process 20

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process 23

Page

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistent With Due Process, Be Established on This Record .. 30

II.

Does the Scope of the Remedial Order Affirmed and Enforced Below Exceed the Powers Granted to the Board by the Act? 33

A. Does the Board Have the Remedial Authority to Continue the Accrual of Liability for Reinstatement Beyond That Date When the Employee Would Have Voluntarily Terminated the Employment Relationship? 33

B. Has the Board Exceeded the Power Granted to It Under the Act by Ordering Petitioners to Establish the Discriminatee in an Independent Business? 35

C. Has the Board Exceeded the Power Granted to It Under the Act by Ordering the Petitioners to Pay, Ostensibly as "Back Pay," Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business? 38

III.

Conclusion 40

INDEX TO APPENDICES

Appendix A. Trial Examiner's Supplemental Decision ..... App. p. 1

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit 32

Appendix C. Judgment 37

Appendix D. Fifth Amendment to the United States Constitution 39

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151 Et Seq.) 39

Federal Rules of Civil Procedure 65(d) 45

TABLE OF AUTHORITIES CITED

Cases	Page
Brown v. NLRB, 462 F.2d 699 (9th Cir. 1972)	37, 39
Handley v. Guasco, 165 Cal.App.2d 703, 322 P.2d 354 (1958)	40
Isis Plumbing and Heating Co., 138 NLRB No. 97, 51 LRRM 1122 (1962)	39
Kloberdanz v. Joy Mfg. Co., 288 F.Supp. 817 (D.C. Colo. 1968)	29
Liberty Electronics Corp., 143 NLRB No. 64, 53 LRRM 1370	19
M. Eskin & Son, 148 NLRB No. 107, 57 LRRM 1121 (1964)	17, 19, 26
Macmorris Sales Corporation v. Kozak, 263 Cal. App.2d 430, 69 Cal.Rptr. 719 (1968)	40
Makela Welding, Inc. v. NLRB, 387 F.2d 40 (6th Cir. 1967)	4, 16, 19
Mastro Plastics Corp., 136 NLRB No. 119, 50 LRRM 1006	34, 35
NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2nd Cir. 1953)	37
NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953)	5, 16, 17, 19, 26
NLRB v. Burns International Security Service, ... U.S. ...., 32 L.ed.2d 61, ... S.Ct. .... (1972)	28, 29
NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939)	19
NLRB v. Golden State Bottling Company, Inc., 353 F.2d 667 (9th Cir. 1965)	9
NLRB v. Hermon Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963)	4, 5, 16, 19, 21, 27

Page

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954) 5, 16, 17, 19, 27

NLRB v. New Madrid, 215 F.2d 908 (8th Cir. 1954) 4, 16, 19, 20, 21

Perma Vinyl Corp., 164 NLRB No. 119, 65 LRRM 1168 (1967) 14, 15, 16, 17, 18, 19, 21, 22, 24, 27, 29, 30, 32

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L.ed. 661, 65 S.Ct. 478 (1945) 5, 16, 19, 24

Rochin v. California, 342 U.S. 165, 96 L.ed. 183, 72 S.Ct. 205 (1951) 23, 32

Schwartz v. McGraw Edison Co., 14 Cal.App.3d 767, 92 Gal.Rptr. 776 (1971) 29

Symms Grocer Co., 109 NLRB No. 58, 34 LRRM 1326 (1954) 17, 19, 26

Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965) 4, 16, 19, 20

Tot v. U.S., 319 U.S. 463, 87 L.ed. 1519; 63 S.Ct. 1241 (1942) 32

United Auto Workers v. NLRB, 442 F.2d 1180 (9th Cir. 1971) 13, 18, 24, 27

United States Pipe and Foundry Company v. NLRB, 398 F.2d 544 (5th Cir. 1968) 13, 15, 17, 18, 24, 27

Wiley v. Livingston, 376 U.S. 543, 11 L.ed. 2d 898, 84 S.Ct. 909 (1964) 19, 27, 28, 29

Rules

Federal Rules of Civil Procedure, Rule 65(d) ..3, 24

Rules of the United States Supreme Court, Rule 19 .. 3

Statutes

	Page
Labor Management Relations Act, Sec. 1(b)	3
Labor Management Relations Act, Sec. 2(3)	3
Labor Management Relations Act, Sec. 7	3
Labor Management Relations Act, Sec. 8(a)(1)	3, 6
Labor Management Relations Act, Sec. 8(a)(3)	3, 6
Labor Management Relations Act, Sec. 10(b)	3
Labor Management Relations Act, Sec. 10(c)	3, 26, 36, 38, 39
Labor Management Relations Act, Sec. 10(e)	3, 6
Labor Management Relations Act, Sec. 10(f)	3, 6
United States Code Annotated, Title 28, Sec. 1254	3
United States Code Annotated, Title 29, Sec. 141-(b)	3
United States Code Annotated, Title 29, Sec. 152 (3)	3
United States Code Annotated, Title 29, Sec. 157	3
United States Code Annotated, Title 29, Sec. 158 (a) (1)	3
United States Code Annotated, Title 29, Sec. 158 (a) (3)	3
United States Code Annotated, Title 29, Sec. 160 (b)	3
United States Code Annotated, Title 29, Sec. 160 (c)	3
United States Code Annotated, Title 29, Sec. 160 (f)	3
United States Code, Title 29, Sec. 160(c)	38
United States Constitution, Fifth Amendment	3

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento (hereinafter sometimes referred to as "Golden State"), and All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento (hereinafter sometimes referred to as "All American"), Petitioners herein, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above-entitled cause on August 21, 1972.

Opinions Below.

This Petition results from a decision of the United States Court of Appeals for the Ninth Circuit affirming and enforcing without modification the Supplemental Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board") which upheld the decision of its Trial Examiner. These decisions, in chronological order, were as follows:

1. On June 13, 1970, the Trial Examiner, Robert L. Piper, executed and filed the Trial Examiner's Supplemental Decision which is incorporated into the decision of the Board. This decision, as incorporated, is reproduced herein as Appendix "A" to this Petition (the decision and recommended order of the Trial Examiner, together with the decision of the Board, shall hereafter be referred to cumulatively as the Board's "Supplemental Decision"). The Supplemental Decision has been reported in 187 NLRB No. 142, 76 LRRM 1868 (1971).

2. On January 21, 1971, the Board upheld the Trial Examiner *in toto* in its Supplemental Decision and Order (Appendix "A").

3. The "*Per Curiam*" decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion"), Judge Kilkenny dissenting, affirmed and enforced *in toto* the decision of the Board. The Opinion is reported as .... F.2d .... (9th Cir. 1972), and is reproduced herein as Appendix "B" to this Petition. The proposed judgment enforcing this Opinion is reproduced herein as Appendix "C" to this Petition.

Grounds for Jurisdiction in This Court.

The Opinion below decides and applies several important questions of federal law contrary to decisions of this Court and several Courts of Appeals, as well as certain important federal questions of first impression, which until now have not been, but ought to be, decided by this Court. On this basis, petition is made to this Court pursuant to 28 U.S.C.A. Section 1254 and U.S. Sup. Ct. Rule 19, for certiorari to review the Opinion below.

The Opinion below was dated and entered on August 21, 1972; no order was sought or made respecting rehearing or respecting an extension of time within which to petition for Certiorari.

Pursuant to application, the United States Court of Appeals for the Ninth Circuit has granted a stay of mandate of its Order to November 9, 1972.

No order has been sought or granted for an extension of time in which to petition for Certiorari.

Constitutional Provisions and Statutes Involved.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes involved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 1(b); 2(3); 7; 8(a)(1), (3); 10(b), (c), (e), (f) as Amended, (29 U.S.C.A. Sections 141(b); 152 (3); 157; 158 (a) (1), (3); 160 (b); 160 (c); 160 (f)) as well as *Federal Rules of Civil Procedure* 65(d) (28 U.S.C.A.). The constitutional provision and the statutes cited, in pertinent part, are printed verbatim and are reproduced herein as Appendix "D" to this Petition.

Questions Presented.

In its deceptively simple opinion, the Court of Appeals plows large sections of new ground in the field of labor law. It fastens upon *both* parties to the bona fide purchase and sale of a business virtually unlimited joint and several liability, both prospectively and retrospectively, to remedy unfair labor practices by approving and actually applying, for the first time in its full sweep, the Board's so-called "*Perma Vinyl* doctrine." In so doing, the opinion raises the following questions:

1. If the owner of a business sells and transfers its entire ownership and interest in that business to a bona fide third party purchaser in a bona fide transaction:

(a) Can the liability of the seller to remedy past unfair labor practices be extended past the time of such sale and continued *ad infinitum* in spite of the fact that the seller is thereafter incapable of terminating this liability? (The Opinion's affirmative holding in this respect not only contravenes decisions of this Court[1] and of the Courts of Appeals for the Sixth and Eighth Circuits,[2] but is violative of due process as well.)

(b) Can the bona fide purchaser be held liable, jointly and severally, with the seller to remedy such unfair labor practice, not only

---

[1]*Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965).

[2]*NLRB v. New Madrid*, 215 F.2d 908 (8th Cir. 1954), *Makela Welding, Inc. v. NLRB*, 387 F.2d 40 (6th Cir. 1967); *NLRB v. Hermon Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963).

prospectively from the time of the sale and transfer, but retrospectively, for the entire period prior thereto, by virtue of the mere fact (assumed *arguendo*) that it takes with knowledge of such unfair labor practice? (Again, the Opinion's affirmative holding contradicts not only decisions of this Court[3] and decisions of the Courts of Appeals for the First, Sixth and Tenth Circuits.[4] but also is violative of due process as well.)

(c) Can such knowledge be "imputed" to such buyer, *ex post facto*, merely by virtue of its post sale retainer of supervisory personnel formerly employed by the seller?

(d) If knowledge cannot be established by such imputation, has the Board satisfied its burden of proving such knowledge merely by discrediting the adverse testimony of its own witnesses on the issue and by drawing adverse inferences from Petitioners' failure to call officers of the purchaser in order to corroborate the negative testimony of the seller on the point?

The Opinion further establishes several new and rather startling principles of application to the specifics of the familiar back pay and reinstatement remedies uni-

---

[3]*Regal Knitwear v. NLRB*, 324 U.S. 9, 89 L.ed. 661, 65 S.Ct. 478 (1945).

[4]*NLRB v. Birdstall-Stockdale Motor Co.*, 208 F.2d 234 (10th Cir. 1953); *NLRB v. Lunder Shoe Corporation*, 211 F.2d 284 (1st Cir. 1954); *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963).

formly ordered in wrongful discharge cases under the Act, thus giving rise to the following further questions:

2. If an employer is found to have discharged an employee wrongfully and discriminatorily in violation of Section 8(a)(3) of the Act:

(a) Can such employer be required to pay to such employee back pay beyond the time when, as found by the Board, such employee would, in any event, have voluntarily terminated his employment relationship with the company?

(b) In compliance with the customary order to "offer such employee reinstatement to his former or substantially equivalent position," can an employer be required to establish such former employee in an independent business?

(c) In compliance with the usual order to pay back pay to such employee/discriminatee, can the employer be required to pay, purportedly as "back pay," compensatory damages to such employee for loss of anticipated profits from an independent business which had yet to be established, particularly where such employee has no prior independent business experience?

Statement of the Case.

(a) Basis for Federal Jurisdiction in First Instance.

The action herein was brought before the Board on charges filed alleging that Golden State had violated the Act; more particularly, Sections 8(a) (1) and (3) thereof, as well as other sections of the Act not now in issue. The court below had jurisdiction by virtue of Sections 10(e) and 10(f) of the Act.

(b) Summary of Proceedings Below.

This matter, in Petitioners' view, is a fairly straightforward "back pay" case. Had the Board so considered it and applied the settled principles applicable to such cases, the matter would not now be before this Court. In its original Order, handed down on June 10, 1964, the Board held, *inter alia*, that one Kenneth L. Baker (hereinafter referred to as "Baker") had been discriminatorily discharged by Golden State on August 16, 1963, and ordered, among other things, that Golden State offer him reinstatement to his former position, or one substantially equivalent, and to make him whole for any loss of earnings. Review of this Order was sought in the United States Court of Appeals for the Ninth Circuit. Following certain delays explained below, the court rendered a decision in November of 1968 enforcing that portion of the Order relating to Baker, while denying enforcement as to other significant parts of the Board's original Order. This Order was not rendered until after Golden State's sale of its bottling and distribution business to All American in January of 1968.

Within the limits of its power to do so, Golden State was perfectly willing to comply with the portions of the Order relating to Baker as originally formulated. However, the Board's view of these requirements, when translated into application, differed radically, (Petitioners submit), from the Board's previous practice and settled law. As a consequence, the matter went to hearing in supplemental proceedings upon a back pay specification. These resulted in a recommended decision and Order by the Trial Examiner dated July 13, 1970 which was adopted *in toto* and without modifica-

tion by the Board on January 21, 1971 (the "Supplemental Decision").

In the Supplemental Decision, the Board required something quite different from that contemplated in the original Order enforced by the Court of Appeals:

Golden State *and* All American as well were not simply ordered to pay the back salary due to Baker, but were instead required to pay him the "profits" he would allegedly have realized from an independent business. Instead of being required to reinstate him to the "former position or substantially equivalent position" which he held prior to the discriminatory termination, Golden State *and* All Amercian were ordered to offer to set Baker up in a separate and independent business.

In addition to the foregoing, which is novel enough in itself, the Board also held the original employer (Golden State) liable to Baker for reinstatement as well as back pay accrual subsequent to the sale of the business and beyond the time when Golden State had any power (by the Board's express holding in this matter!) to offer or perform reinstatement as to Baker. Further, the Board imposed coextensive joint and several liability upon All American, a bona fide purchaser. Thus, All American was held liable and responsible for acts which it not only did not commit, but, which, Petitioners submit, it did not even know about.

The Supplemental Decision was brought before the United States Court of Appeals for the Ninth Circuit upon the Petitions of Golden State and All American for review, and upon the cross-petition of the Board for enforcement. On August 21, 1972 the court handed down its Opinion granting enforcement of the Supplemental Decision in entirety and without modification.

(c) The Facts Upon Which This Case Arose.

The facts upon which this Petition arises commenced on August 16, 1963 when Golden State allegedly wrongfully discharged Baker for union activity. On June 10, 1964 the Board rendered its original decision finding that Golden State had committed certain unfair labor practices. Pursuant thereto, it ordered Golden State to offer reinstatement to Baker to his former position or a substantially equivalent position and to make him whole for any loss of earnings resulting from Golden State's unfair labor practices in violation of Section 8(3) of the Act.

That decision was appealed to the United States Court of Appeals for the Ninth Circuit which, on December 2, 1965, handed down its first opinion herein enforcing, in part only, the Board's original Order.[5]

On January 4, 1966, the court denied the Board's petition for rehearing. However, on April 4, 1966, the court granted the Board's motion to reconsider this denial of rehearing. In November of 1968, over two and one-half years later, the court, upon such reconsideration, reaffirmed its original denial of rehearing. It was thus not until November 27, 1968 that the final decree in this matter was entered [R. 111-112].[6]

During the course of the aforementioned appeal the following three separate sequences of events occurred which dramatically affect the rights of Petitioners here-

---

[5]*NLRB v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

[6]References to the record reproduced as "Volume I Pleadings" are designated "R." References to the Reporter's stenographic transcript of the hearing filed with the Court are designated "Tr." References to exhibits introduced by the General Counsel are designated "GC Ex." References to exhibits introduced by Petitioners are designated "Pet. Ex."

in: on October 1, 1964, the discriminatee would, as found by the Board, have voluntarily terminated his employment relationship with Golden State; on January 31, 1968, Golden State sold and transferred its entire soft drink bottling and distribution operation to All American; and on December 11, 1968, the discriminateee was offered reinstatement to his former position. The failure of the Court of Appeals to come to grips with the consequences of these three separate sets of events (elaborated below) in its Opinion is, Petitioners submit, a primary cause of its failure to render a decision in conformity with existing law.

In October of 1964, Golden State began phasing out a substantial portion of its soft drink business which had until then been serviced by employee driver-salesmen. A number of these were replaced by independent distributors with whom Golden State entered into sub-franchise agreements and who were, in every respect, independent businessmen [R. 113, lines 13-20; 119, lines 19-34; Tr. 224, lines 6-18; 252-254; Pet. Ex. 3]. Within a short time after October of 1964, Golden State had terminated over fifty percent of its distribution operation and turned it over to such independent distributors. The Board expressly held in this matter that these independent distributors were, in fact, independent contractors under the Act [R. 119, lines 20-25; 113, lines 12-20]. While it is true that many of the former driver-salesmen were offered such independent distributor contracts, by no means all of them were given that opportunity [Tr. 189; 196-197; 208; GC Ex. 18B]. By this change:

1. Golden State went out of the soft drink distributing business in October of 1964 as to those routes which were contracted out to independent

distributors. Those driver-salesmen who became distributors voluntarily left the employ of Golden State to become independent distributors.

2. Golden State continued to bottle Pepsi-Cola products, but remained in the distribution business only in the geographical areas still covered by its remaining employee driver-salesmen. Thus, Golden State was always in a position to offer full and complete reinstatement to Baker as a driver-salesman, until the later sale of the balance of its Pepsi-Cola division to All American.

The Supplemental Decision expressly held in this matter that Baker would have been offered an independent distributorship in October of 1964 had he not been previously terminated and that he would have accepted the same (contrary to Golden State's contention before the Trial Examiner) [R. 120, lines 25-27].

Thereafter, on January 31, 1968, Golden State sold its entire Pepsi-Cola bottling division to All American [R. 113, lines 51-57]. Under the sale agreement, All American purchased the assets of the Pepsi-Cola operation and assumed specifically enumerated liabilities. The independent distributorship contracts were assigned by Golden State to All American as a part of that transaction [GC Ex. 15; Tr. 74]. This sale terminated all activities of Golden State in the soft drink bottling or distribution business.

It is absolutely clear from this record that All American had no actual knowledge whatever of the litigation over Baker's discharge prior to the time it acquired this portion of Golden's State's business, *i.e.*, January 31, 1968. The uncontradicted evidence, largely pre-

sented by the General Counsel in the hearing before the Trial Examiner, reflected that because of the long appellate hiatus from April of 1966 to November of 1968, the pendency of this matter had simply been overlooked by the officers of Golden State [Tr. 57, 72-74, 80-83]. It was, after all, regarded by Golden State as a normal back pay case [see Pet. Ex. 1; GC Ex. 22, received by Golden State in March of 1969] and since Baker had promptly obtained other substantial employment [see record of interim earnings, R. 125], the amount of back pay which would normally be due and payable to him, but for the Board's novel order made herein, would not have been substantial.

The sale agreement made no mention whatever of the pending Baker case. To the contrary, it actually contained a warranty that no legal proceedings were pending [GC Ex. 15 a, para. 10.5].

The Board, unable to find any evidence of such knowledge in the record, relied upon its disbelief of the General Counsel's witnesses, who testified no knowledge existed, and upon the adverse inference it drew from the failure of officers of All American to travel from Rhode Island to corroborate these witnesses as "evidence" establishing knowledge. Considerable evidence was introduced on the point, all of which indicates knowledge did *not* exist, but Petitioners feel that it is inappropriate to review such evidence at this time.

Subsequent to the sale, All American continued the bottling operation retaining virtually all employees. Mr. Gene Schilling, General Manager of the Pepsi-Cola operation under Golden State, continued on in this capacity with All American with the title of "President" of the Sacramento bottling division.

Summary of Argument for Allowance of the Writ.

The issues in this case may be grouped under two principal heads:

(a) Those relating to the extent to which remedial liability for unfair labor practices can be imposed against the seller/predecessor and the purchaser/successor of a business; and

(b) Those relating to the sweep of the remedy itself without regard to the party against whom imposed.

As to the first group, the court's Opinion below, and the Board decision which it enforces, contravene settled lines of authority established by this Court and the holdings of other circuits and therefore tenders to this Court the necessity of resolving an irreconcilable conflict on questions of fundamental importance in the field of labor law.

The latter group of questions present two issues of first impression which require decision by this Court, as well as a third issue which the Opinion decides in such a manner as to create a further irreconcilable conflict.

In the area of Seller/Purchaser liability, the court below has adopted and applied, for the first time in its full sweep, the Board's so-called "*Perma-Vinyl* doctrine". Only twice before has this doctrine been considered by Courts of Appeals—once by way of dictum, in the Court of Appeals for the Ninth Circuit[7] and earlier, by way of partial application only, in the Court of Appeals for the Fifth Circuit.[8]

In its extension of liability to both predecessors and successors, in the sale and transfer of a business,

---

[7]*United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971).

[8]*United States Pipe and Foundry Company v. NLRB,* 398 F.2d 544 (5th Cir. 1968).

the *"Perma-Vinyl* doctrine," first enunciated by the Board in the decision of that name (*Perma Vinyl Corp.*, 164 NLRB No. 119, 65 LRRM 1168 (1967), contravenes two distinct lines of authority established by this Court and followed in other circuits. The conflict thus posed can only be resolved by this Court.

Even should the resolution of this conflict by the Court result in the adoption and approval of the *"Perma-Vinyl doctrine"*, however, a further issue, in the within cause, would be presented by reason of the Board's failure to establish the purchaser's prior knowledge of the seller's unfair labor practices, a requisite for the application of the doctrine in any event. In this regard, Petitioners seek a determination of the question whether the technical devices resorted to by the Board and the court in an effort to raise and support such a finding are not offensive to the fundamental notion of due process.

Under the second basic head, two questions of first impression, involving the extent of the Board's remedial powers under the Act are presented. Petitioners will urge that the order which required the Petitioners herein, ostensibly by way of of reinstatement, to establish the discriminatee Baker in an independent business, exceeds such powers. Additionally, it will be argued that a purported back pay award which, in actuality, amounted to an order to pay consequential damages in the form of anticipated profits in an independent business likewise exceeded such powers.

As a final sub-issue in this latter connection, Petitioners will argue the question of whether the voluntary termination of employment by the employee should not also terminate any further liability of Petitioners to remedy unfair labor practices, consonant with earlier Board and court decisions, but in contravention to the court's holding herein.

ARGUMENT FOR ALLOWANCE OF WRIT.

I.

The Board's "Perma-Vinyl Doctrine" Contravenes the Established Authority of This Court and of Several Courts of Appeals and Therefore Creates a Conflict on Important Issues of Law Which Must and Can Only Be Resolved by This Court.

In *Perma Vinyl Corp., supra,* enforced in part only, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB,* 398 F.2d 544 (5th Cir. 1968), the Board required a bona fide purchaser/successor corporation having knowledge, at or before the time of sale, of its predecessor's prior unfair labor practices, to offer reinstatement to employees discharged in violation of the Act. It did not require the purchasing corporation to pay remedial back pay; it did not hold the selling corporation liable for reinstatement or for back pay beyond the date of the sale. However, the Board did not stop there. It announced that thenceforth, as a rule of prospective application, even though a purchaser and the sale itself be wholly bona fide, in a genuine transfer of ownership, the Board would nonetheless hold the seller *and* the buyer liable *jointly and severally* for both reinstatement *and* back pay, if the purchaser took with prior knowledge of the unfair labor practice proceeding.

In so doing, it not only far exceeded the scope of its holding in the case before it; it also reversed itself on its own established doctrine and contravened several prior Court of Appeals holdings and at least two decisions of this Court on the points in question.

Two fundamental aspects of remedial liability are involved: those of a predecessor/seller, and those of a successor/purchaser.

Prior decisions of this Court and other circuits were and are clear that the accrual of liability on the part of a bona fide seller to remedy unfair labor practices is terminated by the bona fide sale and transfer of the business in question.

Textile Workers v. Darlington Mfg., Co., 380 U.S. 263, 13 L.ed.2d 827, 85 S.Ct. 994 (1965), (herein referred to as *"Darlington"*);

NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954), (herein referred to as *"New Madrid"*);

NLRB v. Herman Bros. Pet Supply, 325 F.2d 68 (6th Cir. 1963), (herein referred to as *"Herman Pet Supply"*);

Makela Welding, Inc. v. NLRB, 387 F.2d 40, (6th Cir. 1967), (herein referred to as *"Makela Welding"*).

Prior to *Perma-Vinyl* it had been equally clear, from settled decisions of this Court and other circuits, that the bona fide purchaser of a business, in a transaction which constituted a genuine arms-length, non-collusive sale and transfer, took free of any liability for the predecessor/seller's unfair labor practices, whether such purchaser took with or without knowledge thereof.

Regal Knitwear v. NLRB, 324 U.S. 9, 89 L. ed. 661, 65 S.Ct. 478 (1945); (herein referred to as *"Regal Knitwear"*);

NLRB v. Birdsall-Stockdale Motor Company, 208 F.2d 234 (10th Cir. 1953); (herein referred to as *"Birdsall-Stockdale"*);

NLRB v. Lunder Shoe Corp., 211 F.2d 284 (1st Cir. 1954); (herein referred to as *"Lunder Shoe"*);

NLRB v. Herman Bros. Pet. Supply, supra.

Perma-Vinyl not only conflicts with the foregoing two lines of authority; it also conflicts with previously announced and settled Board doctrine on the same point:

> *Symms Grocer Co.*, 109 NLRB No. 58, 34 LRRM 1326 (1954); (herein referred to as *"Symms Grocer"*);
>
> *M. Eskin & Son*, 148 NLRB No. 107, 57 LRRM 1121 (1964); (herein referred to as *"Eskin"*).

The foregoing three separate lines of authority will be developed and discussed below in examining their specific application to the holding in the case at bar. For the moment, let us continue our examination of *Perma-Vinyl* itself.

The Board decision therein was reviewed, on enforcement proceedings, by the Court of Appeals for the Fifth Circuit, *sub. nom. U.S. Pipe and Foundry Co. v. NLRB, supra* (herein referred to simply as *"U.S. Pipe and Foundry"*). In so doing, the court reviewed the history of the rule involved, taking notice of contrary decisions, principally those of *Birdsall-Stockdale, supra*, and *Lunder Shoe, supra*. The court did not attempt to reconcile the conflicting lines of authority, but in effect settled for the fact that it disagreed with them and agreed with the Board's rationale—up to a point. It enforced the decision in respect of its specific holding only, that is to say, in requiring the successor to offer reinstatement only, and it pointedly withheld approval of the balance of the Board's broad language, particularly that affecting joint and several liability of successors and predecessors in every respect, and further, particularly, in the area of liability for back pay.

In brief, *U.S. Pipe and Foundry* gave something considerably less than unqualified approval to the *"Perma-Vinyl* doctrine", as the Board view it.

In *United Auto Workers v. NLRB,* 442 F.2d 1180 (9th Cir. 1971) (herein referred to as *"United Auto Workers"*) the Ninth Circuit declined to enforce liability for the predecessor's unfair labor practices against a bona fide purchaser corporation which took, *arguendo,* with knowledge where the business, after changing hands, was not essentially the same as previously. This was the extent of the court's holding. Nevertheless, in a concluding paragraph, the court, by Judge Tuttle (on assignment from the 5th Circuit), went on gratuitously to express uncritical approval of the entire breadth and sweep of *Perma Vinyl,* omitting even the *caveats* expressed in *U.S. Pipe and Foundry,* by his own Circuit. This language, we submit, is quite beyond the actual holding and therefore *dictum* in the premises.

Until the Board and court holdings below in the case at bar, the so-called *"Perma-Vinyl* doctrine" amounted to no more than that, namely, an announced policy which had never actually been fully applied in a decided case. The case at bar translates *Perma-Vinyl* from the realm of announced doctrine into actual holding, and thus, for the first time, poses the full conflicts envisaged by the court in *U.S. Pipe and Foundry.*

The full extent of these conflicts may be understood only when one realizes that *Perma-Vinyl* used the bona

fide sale and transfer of a business not as an event which serves to limit liability, but rather as one which operates to *extend* and *broaden* it. It does not restrict the liability of the parties; instead it adds to the picture another party against whom full recourse may equally be had.

The curious thing is that the Board itself, in formulating the doctrine, did not address itself to the contrary authority posed by its own *Eskin, Symms Grocer* line of decisions, or even advert to the *Darlington/New Madrid/Herman Pet Supply/Makela/Regal Knitwear/ Lunder Shoe/Birdsall-Stockdale* lines of authority. Nor did it answer the arguments posed by these cases. It simply avoided them (although it cited, inexplicably, *Regal Knitwear.*) It relied, instead, upon cases totally inapposite: *Wiley & Son v. Linvingston,* 376 U.S. 543, 11 L.ed. 2d 898, 84 S.Ct. 909 (1964); (herein referred to as *"Wiley"*), a case which, as we point out below, involved contractual liability, and two other cases, one similarly involving contractually or specifically assumed liability: *Liberty Electronics Corp.,* 143 NLRB No. 64, 53 LRRM 1370; *NLRB v. Colten,* 105 F.2d 179 (6th Cir. 1939). In the latter case, there was simply no true change of ownership, and therefore no genuine sale.

In other words, none of the authority cited by the Board in the original *Perma-Vinyl* case dealt with or even acknowledged the thrust of the prior and superior authority opposing the doctrine it announced.

With this history and background in mind, we turn to a specific examination of *Perma-Vinyl* in action, as applied in the case at bar.

A. The Application of the Perma-Vinyl Doctrine to Extend Golden State's Liability for Remedial Action Past the Cutoff Point of a Bona Fide Sale Conflicts Irreconcilably With Decisions of This Court and Principles of Due Process.

The Board found that Golden State's sale of its Pepsi-Cola division was a genuine sale and transfer of the whole of that business, at arms-length, to a bona fide purchaser which, until that time, had been, in fact, a stranger to the operation and to Sacramento. With that transaction, Golden State went out of the soft drink bottling and distribution business and terminated all activity in that and related fields. Following the sale, Golden State was, therefore, no longer capable of offering reinstatement to Baker; much less was it in a position to perform on such an offer.

The law applicable to such a situation is set forth in *Darlington, supra,* wherein this Court cited with approval, in support of its holding, the following language from *New Madrid* (380 U.S., at page 271):

> " 'But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred.' "

More specifically pertinent to the point before us here is the following further language from *New Madrid* itself, not actually quoted by this Court in *Darlington,*

but certainly approved by implication (215 F.2d, at page 914):

> "And the Act affords no basis on which to order a person to reinstate employees in a business which he has . . . actually disposed of to another, and as to which he neither in law nor in fact possesses any power over the operations of his successor, either of management right in general or of labor relations control in particular . . . No more, in our opinion, can the Act be said to contain any basis to assess remedial back-pay against such a person, beyond the date of his permanent closing or abdicating sale of the enterprise."

The Court of Appeals for the Sixth Circuit affirmed and applied these same rules in the more recent cases of *Makela Welding, supra,* and *Herman Pet Supply, supra.*

The foregoing line of authority clearly would exonerate Golden State from further accrual of remedial liability past the time of the sale, whether for back pay accrual or reinstatement.

The Board decision herein, based on *Perma-Vinyl,* held directly contrary, finding Golden State liable for "back pay" and reinstatement in the same breadth and extent as though the sale had never taken place. One may search the original decision in *Perma Vinyl,* in vain for an authority to support this aspect of the holding. Equally absent is any mention of the foregoing contrary authority.

The court below, in its Opinion, attempted to skirt this issue by pointing out that Golden State had agreed to indemnify All American for any post-sale liability which might be adjudged against it. In the court's

view, Golden State was thus liable for back pay and reinstatement on an independent basis and, the court concluded, it was not necessary for it to decide the question of the seller's post sale liability.

The Opinion, however, totally misses the point that any post-sale liability of Golden State rests inevitably upon *Perma-Vinyl,* whichever basis is selected, since All American's adjudged liability was also based upon the same doctrine (as we discuss below). Golden State's adjudged liability, therefore, whether one views it as primary or secondary, still depends upon the soundness of *Perma-Vinyl.*

Furthermore, the court's Opinion enforced the Board's decision *without modification* (see Proposed Order, Appendix C below). Clearly an order enforcing remedial liability against a party for an unfair labor practice, carrying with it the potential sanction of contempt proceedings, cannot be adjudged or ordered on the basis of a private contractual commitment. It can only be bottomed on the provisions of the Act itself, and the court's unlimited order of enforcement, therefore, despite the language above discussed, *necessarily* constitutes a holding and order in this respect.

The Opinion also ignores the implications of holding the seller liable for the performance of an act, namely reinstatement, which it is incapable of performing. The absurdity of such a ruling is underscored by the Board's own holding that the offer of reinstatement made to Baker eleven months following the sale was invalid because its author (an employee of All American who had formerly been with Golden State) was, in the Board's view, purporting to represent Golden State in making the offer (a finding not justified by the evidence).

Thus the court and the Board are holding, on the one hand, that Golden State has continuing liability to offer and perform reinstatement but that, on the other hand, any such offer or attempt to perform is void, *ipso facto.*

Just what, one might ask, could Golden State do after the sale to terminate its liability? The holding literally imposes liability *ad infinitum* while, at the same time, denying to the seller the means of complying with what was ordered. Such an order offends the most fundamental notions of justice and fair play to the extent of violating the basic precepts of due process. *Rochin v. California,* 342 U.S. 165, 96 L.ed. 183, 72 S.Ct. 205 (1951).

We believe it is clear from the foregoing that the decisions herein create a conflict and an anomaly which can only be resolved by this Court.

B. The Application of Perma Vinyl to Fasten Unlimited Liability Upon All American, Both Retrospectively and Prospectively, Conflicts With Decisions of This Court and Those of Other Courts of Appeals and, Additionally, Constitutes a Denial of Due Process.

It is undisputed that All American was a bona fide purchaser of Golden State's soft drink bottling operation, that it was a stranger to the business and in no way identified with its predecessor or its predecessor's unfair labor practices. It is further undisputed that the sale was wholly bona fide, that it resulted in a genuine transfer of the seller's entire interest. It was not even suggested, therefore, that the transaction was collusive or entered into as a part of any scheme or plan to evade or frustrate the Board's original order.

In other words, All American was wholly innocent of wrongdoing; there was no evidence whatever of any conspiracy, fraud, evasion, or other basis for independent liability on its part. There existed, therefore, no basis or relationship, "which might of itself establish liability" against All American. *Regal Knitwear*, 324 U.S., at page 15.

Furthermore, All American was not made a party to the wrongful discharge proceedings and was provided no opportunity to participate in the litigation of that matter. To the contrary, it merely purchased the bottling business without assuming this liability from a seller which had warranted, in the purchase agreement, that no litigation pended.

Under settled principles, All American could not, thus, be held to answer for the unfair practices of Golden State. Nevertheless, the Supplemental Decision, and the Opinion in turn, fastened upon All American total liability, jointly and severally with Golden State, for reinstatement and back pay accruals, both before as well as after the sale.

The proposed Order was drawn in the language of Rule 65(d) of the Federal Rules of Civil Procedure. The cited authorities were those discussed above: *Perma Vinyl, U.S. Pipe and Foundry* and *United Auto Workers.*

In *Regal Knitwear, supra,* this Court specifically held that Rule 65(d) could not be used to extend the reach of Board orders to "successors" or "assigns" who were innocent of wrong-doing and against whom there existed no independent basis for adjudging liability. In so doing, the Court clearly excluded the notion that a purchaser, simply by taking with knowledge of

a predecessor's peculations, could be held to answer in the same measure, if the sale were otherwise bona fide and the transfer of ownership genuine.

As stated by this Court in that case (324 U.S., at page 13):

> "The courts, nevertheless, may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not yet been adjudged according to law."

Further, the language of the Act itself prohibits such an extension of liability. Section 10(c) thereof provides, in pertinent part, as follows:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any *person named in a complaint has engaged or is engaging in any* such *unfair labor practice,* then the Board . . . shall issue and cause to be served *upon such person* an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." (Emphasis added).

With this language in mind, the Board itself stated, in *Symms Grocer,* as follows:

> "Having re-examined the legal basis for its determination in the original decision herein that Idaho [successor] was responsible for remedying the unfair labor practices of Symms, the Board now believes that it lacks any statutory authority to make any such determination. Section 10(c) of the Act empowers the Board to require unfair

labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein." (34 LRRM, at page 1327).

This line of reasoning was again confirmed by the Board in its decision in *Eskin, supra.*

The Board reasoning in this respect finds its echo in the direct holdings of no less than three Circuits. One of the first to deal with the subject was the case of *Birdsall-Stockdale, supra,* where the court stated (208 F.2d, at page 237):

"While administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority, the courts may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.

"Where successors and assigns are in active concert or participation with a defendant or respondent in the violation of an order, or are instrumentalities through which the defendant or respondent seeks to evade an order, they are brought within the scope of contempt proceedings by Rule 65(d), supra.

"Orders of the National Labor Relations Board are binding upon successors and assigns whose operations are 'merely a disguised continuance of the old employer' . . .

"The Supreme Court, in the *Regal Knitwear* case, made it clear that those decisions were pred-

icated, not merely on succession, but on a consideration of the relationship between the defendant and the successor which might *of itself* establish liability within the terms of Rule 65(d), a relationship not present in the instant case." (Emphasis supplied).

This position was echoed by the First Circuit in *Lunder Shoe, supra* (1954), and again by the Sixth Circuit in *Herman Bros. Pet Supply, supra* (1963), in which the courts held that if there was, in fact, a bona fide discontinuance and true change of ownership, the new owner would not be subject to the Board's order, and the duty of reinstatement thereby terminated.

Opposed to this unbroken line of authority, *Perma Vinyl* stands virtually alone, except for the limited holding in *U.S. Pipe and Foundry*, the dictum in *United Auto Workers* and, finally, the square holding in the case at bar.

As we observed above, the Board, in the original *Perma Vinyl* decision, dealt with the wealth of authority opposing its conclusions by the simple expedient of ignoring it. It attempted to support its holding principally by reliance upon the decision of this Court in *Wiley & Sons v. Livingston, supra,* a case having nothing to do with unfair labor practices, but dealing instead with obligations which, as noted by the Court, were contractual and therefore consensual in origin. *Wiley* was limited to a decision regarding a successor corporation's liability to arbitrate certain issues pursuant to the collective bargaining agreement executed by its predecessor. Its extension, by analogy, to the liability of a successor for the unfair labor practices of a predecessor, was specifically rejected by this Court,

when the contention was advanced to it, in the case of *NLRB v. Burns International Security Service,* .... U.S. ...., 32 L.ed.2d 61, ... S.Ct. .... (1972). The problem was dealt with in the following language (32 L.ed., at page 72):

> "We do not find Wiley controlling in circumstances here. Wiley arose in the context of a Section 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of Section 8(d). That decision emphasized 'the preference of National Labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate 'construed in the context of National Labor Law,' survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. ID., at 549, 551."

The Court went on to state, on the same page:

> "Its [Wiley] narrow holding dealt with the merger occurring against a background of State law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."

In other words, if *Wiley* itself did not make it quite clear, *Burns International Security Service, supra,* doubly underscored the fact that *Wiley* was not authority for extending or even affecting settled principles regarding the liability of successors in unfair labor practice cases.

The force of this authority (*Burns*) was quite apparent to Judge Kilkenny in the case at bar, who based his dissent, as to the portions of the opinion dealing with predecessor/successor liability, squarely upon the authority of this decision, observing that it could not be reconciled with *Perma Vinyl.*

The anomaly created by *Perma Vinyl* is not restricted to the field of labor law, for it is equally offensive to settled principles at common law which, generally speaking, refused to hold a successor/purchaser liable for the torts of a seller/predecessor unless such liability had been specifically assumed. See, for example, *Schwartz v. McGraw Edison Co.*, 14 Cal.App.3d 767, 92 Cal.Rptr. 776 (1971); *Kloberdanz v. Joy Mfg. Co.*, 288 F.Supp. 817 (D.C. Colo. 1968).

The persuasiveness of these common law cases becomes quite important when one realizes that, as pointed out above, *Wiley* resulted from state law requiring the result rendered therein. In the case at bar, state law requires a result opposite to that reached in the court below.

Petitioners urge that the conflict posed by *Perma Vinyl*, in this aspect of its application to the case at bar, can only be resolved by this Court. They further submit that it must not only yield to the weight of opposing authority, but that it must fall for lack of any sound basis or authoritative support in the first instance.

C. Perma Vinyl Is Inapplicable to Establish Liability Against All American in Any Event, Since the Essential Element of Knowledge Cannot, Consistent With Due Process, Be Established on This Record.

Even *Perma Vinyl* does not purport to hold a successor liable for remedial action where it takes with no prior knowledge of its predecessor's unfair labor practices.

On this issue, of course, the General Counsel had the burden of proof, a burden which it failed to sustain in the instant case. The record below not only reveals the absence of any evidence tending to establish pre-sale knowledge of Golden State's unfair labor practice on the part of All American, it discloses that the only evidence directly bearing on the point positively negates the existence of such knowledge. This evidence was given by two officers of Golden State, both called by the General Counsel to testify on the point.

With this testimony in the record, Petitioners, on their case, did not feel it necessary to summon officers of All American all the way across country from Rhode Island merely to corroborate what the officers of Golden State had already testified to, particularly since it was an issue on which Petitioners did not have the burden.

The Board, hard put to find a basis on which to conclude that All American had knowledge, turned the trick by an ingenious, if unacceptable, solution: it simply discredited the two witnesses on the point and then raised an "inference" of knowledge, based upon Petitioners' alleged failure to call officers of All American to testify on the point.

This specious tactic was challenged before the court below, which evidently agreed with Petitioners

that the point was untenable, since it upheld the finding of knowledge by resorting to a totally different device. It observed that All American, after the sale, had retained in its employ, certain supervisory personnel who had formerly been employed by Golden State and had been privy to the commission of the unfair practices in question. Wholly on the basis of this continuity in the identity of the operation itself and the personnel involved in it, the court held that All American could be properly charged with knowledge of its predecessor's unfair labor practice. While the court does not use the term, the only conceivable basis for so finding, would be knowledge by imputation.[9] We believe this holding to be as untenable as the Board's, and equally repugnant to principles of due process.

Any knowledge attributable to All American on this basis is a technical fiction and cannot take the place of actual knowledge. Furthermore, since the retainer of the personnel and, in fact, the actual acquisition of the business was, by definition, post-sale, the knowledge cannot be imputed to the purchaser at the time of or prior to the sale itself, except by doing so *ex post facto*. Such technicalities and devices are not appropriate to our concepts of justice or fairness, and certainly cannot be utilized to support a finding which flies in the face of the evidence and the actual facts.

It does not require great acumen to appreciate that if this type of reasoning should prevail generally, the whole concept of an innocent purchaser without knowledge would disappear, since the purchaser would invariably and inevitably be tainted *ex post facto* by what it

---

[9]"Imputation" was the actual term used by the court in the course of the oral argument.

had acquired. There simply could be no such thing as a non-bona fide purchaser without knowledge. *Ergo,* actual pre-sale knowledge or no actual pre-sale knowledge, *Perma Vinyl* would be applicable in all instances.

In *Tot v. U.S.,* 319 U.S. 463, 467; 87 L.ed. 1519; 63 S.Ct. 1241 (1942), the Court stated:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

Furthermore, in *Rochin v. California, supra,* the Court stated on page 169:

> "Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses.'. . ."

Petitioners submit that the devices resorted to by the Board and the court to raise an "inference" of knowledge, in the absence of evidence thereof, constitute a denial of due process which can, and must, be rectified by this Court.

II.

Does the Scope of the Remedial Order Affirmed and Enforced Below Exceed the Powers Granted to the Board by the Act?

From the remedial aspects of the Supplemental Decision as confirmed by the Court of Appeals, arise three further issues, including two of first impression: (a) Can any remedial action be required past the time when an employee would have terminated his employment relationship; (b) Can the Board order an employer to "reinstate" an employee into a non-employment situation, *i.e.*, an independent business;[10] and (c) Can an employer be required to pay, under the guise of a "back pay" order, anticipated profits of an independent business.[10]

A. Does the Board Have the Remedial Authority to Continue the Accrual of Liability for Reinstatement Beyond That Date When the Employee Would Have Voluntarily Terminated the Employment Relationship?

Golden State's conversion of the several routes which became independent distributorships commenced on or about October 1, 1964. It was originally contended by Golden State below that Baker would not have been offered such a distributorship and that the issue of his reinstatement and back pay therefore related only to the position and pay of an employee driver-salesman.

The Board contended otherwise, however, and, on conflicting evidence, concluded and found that on October 1, 1964, Baker would have been offered and would have accepted a distributorship, thus definitely termi-

---

[10]During the course of the oral argument before the Court below, the General Counsel, in response to a query from the Court, conceded that these issues constituted matters of first impression.

nating his employment relationship with Golden State [R. 120, lines 25-33].

As earlier noted, Petitioners throughout have contended (a contention not disputed by the General Counsel below), and the Board expressly found, that these distributorships were independent businesses and the distributors themselves independent contractors. See, for example, the following excerpt from the Supplemental Decision:

> "Respondent began converting its driver-salesmen to distributors, or *independent contractors*, by offering each of them . . . contracts as distributors, or *independent contractors*, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers . . ." [R. 119, lines 20-25]. (Emphasis added).

See also R. at 113, lines 12-20.

It is thus clear that the Board's finding with respect to Baker's acceptance of a distributorship means that on October 1, 1964, he would have left the employ of Golden State to go into business for himself.

Under the rule enunciated by the Board in *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006, an employer's liability for reinstatement and further back pay accruals ceases to run beyond the date on which the discriminatee would have voluntarily left that company's employ. In that case, the Board said at pages 1009-1010:

> "Only if the evidence supports a finding that the claimant would have left Respondent's plant . . . in order to obtain this particular new job is his

claim from that time disallowed. *A claimant who goes into business on his own is treated similarly to one who obtains interim employment.*" (Emphasis supplied).

Mastro Plastics was enforced in 354 F.2d 170 (2nd Cir. 1965) and impliedly approved by this Court, which denied certiorari (384 U.S. 972).

The Board's and the court's decisions in the case at bar extended Golden State's liability past this cut-off point to create yet one more conflict with settled Board and court law which can only be resolved by the definitive pronouncement of this Court.

It is also apparent that a decision of this issue in accord with the rule announced in *Mastro Plastics* would definitively resolve, by mooting, all other issues tendered in this case, since questions of successorship and other aspects of remedial liability would never be reached.

B. Has the Board Exceeded the Power Granted to It Under the Act by Ordering Petitioners to Establish the Discriminatee in an Independent Business?

On December 11, 1968, within fifteen days subsequent to the final determination that Baker's discharge constituted an unfair labor practice, Mr. G. Schilling, President of All American's Sacramento Division, conveyed an offer of reinstatement to Baker [Pet. Ex. 1]. In so doing, Mr. Schilling was attempting to comply with the Board's Order which required him to:

"... offer Baker immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him

of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period."

The Board, however, held this offer invalid for the reason that an offer of a position as driver-salesman was insufficient since, but for the discrimination, Baker would have become an independent distributor.

It is readily apparent that any requirement that Baker be "reinstated" as an independent contractor exceeds the scope of the Act and the powers granted to the Board thereunder. Review of the language contained within the Act leaves no doubt that its ambit is limited to the employee-employer relationship. The evidence of this fact is found within the Declaration of Policy under the Act which states:

> "It is the purpose and policy of the Act . . ., to proscribe the legitimate rights of both employees and employers in their relations affecting commerce, . . ."

Furthermore, Section 10(c) of the Act, in enumerating potential remedies, states that a person committing an unfair labor practice may be required to cease and desist from such unfair labor practice, and to make such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this Act.

The Order rendered in this matter, as set forth above, conforms with this limitation. The offer of reinstatement to Baker as a driver-salesman conformed with the precise terms of this Order in that he was offered a position in the Pepsi-Cola Bottling Company.

If the Petitioners had attempted to conform with the Order by offering Baker a contract under which he could establish an independent business, this would have been an insufficient compliance in that no "position" would have been offered.

The Opinion of the Court below attempts to avoid this fact by citing authority to the effect that it is properly within the Board's power to reinstate an employee to a position, not covered by the Act, to which the employee would have been promoted or transferred. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-7 (2nd Cir. 1953).

Petitioners do not dispute the validity of the cited authority. They argue, instead, that it offers no support to the proposition for which it is cited but, rather, lends weight to the position urged by Petitioners themselves. The Act was intended to deal only with matters touching the employer/employee relationship. Promotions, even to those involving supervisory capacity, still involve the relationship of *employment*.

It is quite obvious that relationships between independent businesses are not, and never have been, covered by the provisions or the policies of the Act. The attempted extension of Board power sanctioned by the Opinion is one of first impression and represents a view of the Board's remedial authority which is unique to say the least.

The dissenting opinion of Judge Kilkenny, recognizing the order in its present form deals with such relationships between independent businesses (*Brown v. NLRB*, 462 F.2d 699 (9th Cir. 1972)), determined that it exceeded the powers of the Board.

Petitioners likewise urge that such an order is excessive and requires definitive consideration and pronouncement by this Court.

C. Has the Board Exceeded the Power Granted to It Under the Act by Ordering the Petitioners to Pay, Ostensibly as "Back Pay," Consequential Damages Based on Alleged Loss of Anticipated Profits of a Business?

The "back pay" Order enforced below directed Petitioners to pay to Baker, for the period subsequent to October 1, 1964, not wages or salary which he might have earned as an employee, but rather, anticipated profits which he allegedly would have earned had he gone into business as an independent distributor on that date.

What this amounts to is an order to pay compensatory damages based upon anticipated—and wholly speculative—profits which might have been earned in a business which was never begun, by a person who had never before been in business for himself.

This Order and the Opinion enforcing it are matters of first impression.

No special authority is cited to sustain this novel and remarkable conclusion other than the standard authority contained in the Act itself relating to back pay awards[11] and cases decided pursuant to that unquestioned authority. The opinion overlooks other au-

---

[11]Section 10(c) of the Act, 29 U.S.C. 160(c):
". . . the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back *pay*, as will effectuate the policies of this Act . . ." (emphasis supplied).

thority which clearly excludes the extension of the Board's "make whole" powers to such length.

The Board itself, in *Isis Plumbing and Heating Co.*, 138 NLRB No. 97, 51 LRRM 1122 (1962) observed that

> "Back pay . . . is not a fine or a penalty imposed on the Respondent . . . it is an *indebtedness* arising out of an obligation imposed by statute, an incident fixed by law to the *employer/employee* relationship." (Emphasis added).

Moreover, in that same case, two dissenting members of the Board were at pains to point out that the remedy of back pay, specifically mentioned in the Act (§10-(c) thereof) represented a deliberate choice by Congress between competing policies, and that in making such choice, the Congress specifically rejected the suggestion that the Board be empowered to award compensatory damages and specifically limited it to the remedy for lost *wages*.

It is thus doubly clear that Congress empowered the Board to order remedies which restored emoluments flowing from the employment relationship alone, but specifically excluded it from any power to award generally damages particularly those stemming from non-employment relationships.

It is also clear that the court below was of two minds on the subject, since one of the cases cited by Judge Kilkenny in his dissenting opinion, *Brown v. NLRB, supra,* emphasizes the impact upon this issue of the fact that the distributorships were independent businesses and the distributors themselves independent contractors.

The Board's Order and the Opinion itself, in this respect, are equally offensive to settled concepts of damages in the common law, even were that context appropriate, since the damages awarded were wholly speculative, being profits allegedly anticipated from a "start-up" business with no prior operation or earnings history whatever. See, for example, *Macmorris Sales Corporation v. Kozak*, 263 Cal.App.2d 430, 69 Cal. Rptr. 719 (1968); *Handley v. Guasco*, 165 Cal.App. 2d 703, 322 P.2d 354 (1958).

The validity of these concepts is underscored by the fact that in the instant case, two of the driver-salesmen who became independent distributors for Golden State went bankrupt [R. 271-273], while two other driver-salesmen who accepted distributorships, later asked for and obtained back their former positions as driver-salesmen for the reason that they had been unable to make a go of it as distributors [R. 272].

In any event, the Board's power does not reach into this area, and its attempt to do so, as enforced by the Opinion below, is one of first impression which requires review and decision by this Court.

III.

Conclusion.

The irreconcilable conflict between the Supplemental Decision and the Opinion below, on the one hand, and settled decisions of this Court followed in numerous other circuits, on the other hand, as well as the novel and remarkable questions of first impression presented, cast into doubt and uncertainty important and frequently applied areas of labor law.

The conflict thus posed, and the questions thereby presented, can only be resolved by definitive pronouncement of this Court. Petitioners therefore urge the granting of this Writ in order to assure such consideration and determination.

Respectfully submitted,

MORTON B. JACKSON,
Attorney for Petitioner Golden State.

GILFORD G. ROWLAND,
Attorney for Petitioner All American Beverages, Inc.

Of Counsel:
JACKSON, GOODSTEIN, KUMLER,
COPES, CROSKEY & SMITH,
ROWLAND, CLOWDUS & PARKER.

APPENDIX A.

Trial Examiner's Supplemental Decision.

TXD-(SF)-106-70
Sacramento, Calif.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

Golden State Bottling Company, Inc. d/b/a Pepsi Cola Bottling Company of Sacramento, and All American Beverages, Inc. d/b/a Pepsi Cola Bottling Co. of Sacramento[1] and Edward J. Farrell, An Individual and P.C.B.C.E., Inc., Party to the Contract. Case No. 20-CA-2656.

Douglas H. Barton, Esq., for the General Counsel; *Jackson, Kumler, Copes & Croskey*, by *Morton B. Jackson, Esq.*, and *Stanley Feldsott, Esq.*, of Los Angeles, Calif., for Respondents.

Statement of the Case

ROBERT L. PIPER, Trial Examiner: On June 10, 1964, the National Labor Relations Board issued its Decision and Order,[2] finding that on August 16, 1963 Respondent Golden State Bottling Company, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento (hereinafter called Golden State), had discriminatorily discharged Kenneth L. Baker in violation of Section 8(a)-(3) and (1) of the Act, and ordering Golden State, its officers, agents, successors and assigns, to offer Baker immediate and full reinstatement to his former or sub-

---

[1]At the opening of the hearing upon unopposed motion of the General Counsel the caption was amended to include All American Beverages, Inc.

[2]147 NLRB 410 (1964).

stantially equivalent position and make him whole for any loss of earnings occasioned by such discrimination by payment to him of a sum of money equal to that which he would normally have earned from the date of such discrimination until the date of reinstatement, less his net earnings during that period. On December 2, 1965, United States Court of Appeals for the Ninth Circuit issued its decision[3] affirming and enforcing, *inter alia*, the Board's Order with respect to Baker. Because of a request by the Board for rehearing and other intervening factors, the Court issued its final decree enforcing in full the Board's Order with respect to Baker on November 27, 1968.

A controversy having arisen over the amount of backpay due under the terms of the Board Order and Court Decree, on September 30, 1969, the Board's Regional Director for the 20th Region issued a Backpay Specification and Notice of Hearing alleging, *inter alia*, that Golden State had not offered Baker reinstatement as required, that accordingly backpay continued to run, and calculating backpay for an interim period ending June 30, 1969. On November 25, 1969, Golden State filed its answer alleging, *inter alia*, that on December 11, 1968, Golden State had offered Baker reinstatement to employment substantially equivalent to that which he would have had if he had not been terminated. On December 19, 1969, the Regional Director, having during November, 1969 ascertained for the first time that on or about January 31, 1968 Golden State had sold its bottling business to All American Beverages, Inc. (formerly known as Sam Snead All American Golf, Inc.) thereafter d/b/a Pepsi

---

[3] *N.L.R.B. v. Golden State Bottling Company, Inc.*, 353 F.2d 667 (9th Cir. 1965).

Cola Bottling Company of Sacramento, withdrew his previously issued Backpay Specification and issued a Supplemental Backpay Specification and Notice of Hearing.

Said Supplemental Backpay Specification alleged, *inter alia,* that All American Beverages, Inc. (hereinafter called All American), constituted a successor to Golden State within the meaning of the Board's Order and accordingly was also liable for Baker's reinstatement and backpay, that Baker had not been offered reinstatement to his former or substantially equivalent position by either Golden State or All American, and contained a corresponding interim calculation of backpay from the date of discrimination through June 30, 1969. The answer dated January 16, 1970 of Golden State and All American (hereinafter collectively called Respondents), verified for Golden State by the same officer as its previous answer, admitted the sale of the bottling business by Golden State to All American on January 31, 1968, denied that All American was a "successor" to Golden State in any manner liable for Baker's reinstatement or backpay, and, contrary to Golden State's original answer, denied any liability for backpay or reinstatement after January 31, 1968 because of the sale on that date to All American. Respondents' answer did not allege, alternatively or otherwise, that either Respondent had offered Baker reinstatement on December 11, 1968 or at any other time. Respondents' answer also denied that Baker would have been offered a distributorship or/compensated as such on a commission basis, as alleged in the Supplemental Backpay Specification. Both answers challenged the method of backpay computation employed by the General Counsel in the Specifications.

Hearings were held on February 3 and 4, 1970. At the opening of the hearing the General Counsel's unopposed motion to amend the Supplemental Backpay Specification by substituting the Exhibit A attached to Respondents' answer for Appendix A of the Specification through the third quarter of 1964, and substituting General Counsel's proffered exhibits 2, 3, 4, 24 and 25 for Appendices B, C-1, E-1, C-2 and E-2 of the Specification, respectively, with corresponding corrections in the monetary totals set forth in the Specification, was granted. All parties were represented by counsel and afforded all rights of due process. The General Counsel and Respondents filed briefs. The motions of the General Counsel and Respondents to correct the official transcript of the proceeding are granted, as set forth in Appendix A attached hereto. Upon the entire record in the case and from my observation of the witnesses, I make the following findings, conclusions and recommendations:

A. *The Issues*

The issues as framed by the Supplemental Backpay Specification and Respondents' answer thereto are (1) whether All American is a successor to Golden State, with prior knowledge of the pendency of this unfair labor practice proceeding, liable for Baker's reinstatement and jointly and severally liable with Golden State for Baker's backpay; (2) whether on or about October 1, 1964 Golden State would have offered, and Baker would have accepted, a distributorship, under which he would have been converted by contract from a driver-salesman to a distributor, or independent contractor, with earnings or income based upon net profits from sales, characterized in the Specification as commissions, as distinguished from the base pay and commissions

paid driver-salesmen, and, accordingly, was entitled to an offer of "reinstatement" as a distributor rather than as a driver-salesman; (3) whether, assuming Baker would have been offered and would have accepted a distributorship, his gross backpay should be computed upon the net profits of a comparable distributor, as alleged in the Specification, or upon Baker's estimated case sales as a distributor, computed by multiplying his former ratio of sales as a driver-salesman by the average case sales of all driver-salesmen and distributors during the relevant period, and in turn multiplying such estimate by the average net profit per case of the five top distributors during 1968, as alleged in the answer; and (4) whether, although not alleged in Respondents' answer to the Supplemental Specification, on December 11, 1968 All American offered Baker reinstatement or employment which was substantially equivalent to what he would have had if he had not been discriminatorily discharged, as required by the Board's Order.

B. *Background Facts*

As hereinabove found, on June 10, 1964 the Board ordered Golden State to reinstate Baker and make him whole for any loss of earnings, and the Court of Appeals affirmed this Order on December 2, 1965. Edwin J. Crofoot was president of Golden State, and he and his son, Edwin J. Crofoot II, vice president, owned all of its stock. Golden State owned other assets and business properties in addition to its bottling company, which it operated as Pepsi Cola Bottling Company of Sacramento under a franchise from the Pepsi Cola Company. Eugene Schilling was the general manager of the Bottling Company and also the secretary of Golden State, although not a stockholder. As the gen-

eral manager he was in charge of and managed the day-to-day operations of the Bottling Company, was a major participant in the previously found unfair labor practices and was the official who discharged Baker in violation of the Act. On January 31, 1968, unknown to the Board, the Court or Morton B. Jackson, counsel for Golden State in the prior proceeding and counsel for both Golden State and All American in this present proceeding, Golden State sold and transferred the Bottling Company as a going concern to All American, who thereafter operated it as a division doing business as the Pepsi Cola Bottling Company of Sacramento. Schilling thereupon became the general manager and "president" of the division of All American operating the Bottling Company, performing substantially the same function of running the plant as he had for Golden State. The meaning of the title president is not clear inasmuch as the record establishes that Schilling was not an officer or stockholder of All American.

On November 14, 1968, more than 9 months after the sale and transfer of assets, Schilling, who was no longer connected with or authorized to represent Golden State, sent the Court of Appeals a substitution of attorneys in the instant case signed by him as general manager of Golden State. On November 27, 1968, the Court issued its Final Decree enforcing the Board's Order with respect to Baker. Shortly after the Court's Decree, the Regional Director by letter requested Golden State to post the notice to employees and offer Baker reinstatement as required by the Decree. On December 11, 1968, Schilling posted such notice, which he signed as "president of Golden State," and sent the Board a certificate of such posting signed by him as "president of Golden State." The same day on a letter-

head entitled "Pepsi Cola Bottling Company, Sacramento," Schilling sent Baker a letter offering him reinstatement to his former position as a route driver, again signing this as president, with copies to Jackson and the Board. Because Baker and the Regional Director believed that Baker was entitled to a reinstatement as a distributor, as considered fully hereinafter, Baker did not accept this offer. On January 22, 1969, Schilling sent the Regional Officer certain payroll information on behalf of Golden State, again signing as president of the company. During February and March of 1969 the Regional Officer corresponded with Jackson and met with Schilling concerning the computation of backpay due Baker by Golden State. Neither Jackson nor the Board knew of the transfer of the Bottling Company to All American more than a year previously.

No agreement with respect to Baker's backpay having been reached and Schilling having instructed Jackson not to settle, on September 30, 1969, the Regional Director issued the original Backpay Specification. On or before November 18, 1969 Jackson advised the Regional Office for the first time that Golden State had sold and transferred its business to All American in 1968. Nevertheless, on November 19 Jackson signed an answer to the Backpay Specification on behalf of "Golden State doing business as Pepsi Cola Bottling Company of Sacramento," also alleging that Golden State so doing business had on December 11, 1968 offered reinstatement to Baker, which answer Crofoot verified as president of Golden State "doing business as Pepsi Cola Bottling Company" before a notary public on November 24, 1969, and which was filed with the Regional Office on November 25. Thereafter the Regional Director withdrew the previous Backpay Specification and issued

a Supplemental Backpay Specification and Notice of Hearing, alleging that All American was a successor to Golden State as a result of the transfer and sale of the assets in 1968, and had knowledge of the pending unfair labor practice proceedings before the transfer. On January 16, 1970 Jackson signed an answer to the Supplemental Backpay Specification on behalf of both Golden State and All American, which answer was verified on January 15, 1970 by Schilling as manager of the Pepsi Cola Bottling Company of Sacramento, a division of All American, and by Crofoot as president of Golden State, but not doing business as the Pepsi Cola Bottling Company of Sacramento. Respondents' answer alleged that neither Respondent was liable for Baker's reinstatement and backpay after January 31, 1968 because of the bona fide sale and transfer by Golden State to All American on that date. The answer did not allege that either Respondent offered Baker reinstatement, but Respondents' brief contends that the letter sent by Schilling to Baker on December 11, 1968 constituted an offer of reinstatement, without identifying by whom.

C. *The Liability of All American as a Successor*

The record establishes and there is no dispute that All American was a bona fide purchaser for value unconnected with Golden State, in no sense an *alter ego* or participant in any plan or device to evade the Board's Order. Despite the pleadings, there was no substantial dispute and the record establishes that All American was a successor employer within the meaning of the Act. The well-established applicable criterion is whether or not the "employing industry" remains substantially the same. The transferred business was contined substantial-

ly unchanged without interruption, the only variance being that the three top corporate officers of Golden State, two of whom owned all of its stock, no longer continued with the operation in such capacity, although each agreed not to compete and to remain as a consultant for 10 years for a substantial consideration set forth in the sale contract. Schilling, who was the secretary of Golden State and general manager of the bottling company, became general manager and "president" of the bottling company, a division of All American, but not an officer of All American. All of the other managerial and supervisory personnel continued with All American. All but two or three of the approximately 50 employees were transferred to and retained by All American. All of the 12 distributors who handled the products under contract continued with All American. The product remained the same, the customers remained the same and there was no cessation or change in the method of operation of the plant. Thus the record establishes and I find that the employing industry remained substantially unchanged and that All American was a successor within the meaning of the Act.

It has long been established that such a successor is required to bargain with the labor organization which represents the employees of the predecessor, and the Board has recently held that such a successor is required to honor the collective-bargaining contract entered into between its predecessor and a labor organization.[4] With respect to the liability of such a successor for a predecessor's unfair labor practices, particularly for reinstatement and backpay of discriminatees, it is

---

[4] *William J. Burns Detective Agency, Inc.*, 182 NLRB No. 50 (1970).

now established that such a successor, who acquires with knowledge of the pendency of unfair labor practice proceedings against the precedessor, is liable for reinstatement and jointly and severally liable with its predecessor for backpay.[5] Respondents incorrectly contend, based upon earlier decisions[6] of the Board since expressly overruled by it,[7] that a bona fide purchaser for value, despite knowledge by it, a successor, of the pendency of unfair labor practice proceedings against the seller, is not liable and that the sale terminates all liability of both for reinstatement and backpay thereafter.

In *Perma Vinyl, supra,* involving a bona fide purchaser for value with knowledge of the pendency of unfair labor practice proceedings against the seller, the Board, reversing *Symns Grocer Co., supra,* and in reliance upon the teachings of the Supreme Court in *Wiley,*[8] held that "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct." The Board noted that "the imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor prac-

---

[5]*Perma Vinyl Corporation,* 164 NLRB 968 (1967), enf'd *sub nom. U.S. Pipe and Foundry Co. v. N.L.R.B.,* 398 F.2d 544 (5th Cir. 1968).

[6]E.g., *Symns Grocer Co.,* 109 NLRB 346 (1954); and *M. Eskin & Son,* 148 NLRB 1022 (1964).

[7]Note 5, *supra.*

[8]*John Wiley & Son, Inc. v. Livingston,* 376 U.S. 543 (1964).

tices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices."[9] The Board further stated: "If the unfair labor practice has been the discriminatory discharge of employees, this responsibility should include the reinstatement of the discriminatees *without loss of pay*." (Emphasis added.)

Because that decision constituted a reversal of its prior position, the Board did not hold the successor liable for backpay inasmuch as that would have constituted a retroactive application thereof, but did hold the successor liable for reinstatement. However, the Board made clear that in all future cases such successors would be held jointly and severally liable with the predecessor for backpay. With respect to the predecessor, the perpetrator of the unfair labor practices, the Board held that "it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer . . . . the offending employer and his successor share a joint and several responsiblity in the matter of back-

---

[9]As found herein, Golden State through Crofoot agreed to indemnify All American for any monetary losses as a result of this proceeding.

pay." The Court of Appeals affirmed the Board's Order requiring reinstatement by the successor.[10] The Court, while expressing some reservations in a footnote with regard to the Board's holding with respect to backpay, specifically did not pass upon the liability of a successor for backpay because such was not involved in the case, stating that such "backpay question remains for another day."

The Board has subsequently made clear that it did not intend in *Perma Vinyl* to require successors to remedy all of the unfair labor practices of their predecessors, e.g., the posting of cease and desist notices concerning unfair labor practices engaged in by the predecessor, but that in cases of discriminatory discharge a successor with knowledge is liable for reinstatement and jointly and severally with the predecessor liable for backpay.[11] Because of the special circumstances present therein, i.e., the fact that the successor employed only 90 of the 120-130 employees of the predecessor, making it impossible to determine whether the discriminatees would have been among those immediately offered employment by the successor, the Board did not hold the successor liable for backpay, but only for subsequent reinstatement and backpay thereafter. However, the Board made clear that, absent such special circumstances, the rule enunciated in *Perma Vinyl* with respect to the liability of a successor with knowledge for reinstatement and backpay remained unchanged. I conclude and find that All American, as a successor to Golden State with knowledge of the pendency of the unfair labor practice proceedings against it, is liable for the reinstatement of Baker and jointly and severally liable with Golden State for backpay.

---

[10]Note 5, *supra.*

[11]*Thomas Engine Corporation,* 179 NLRB No. 165 (1969).

Unlike the issue of successorship, i.e. the continuity of the employing industry, the issue of knowledge by All American prior to the purchase of the pending unfair labor practice proceedings against Golden State was very much in dispute and strenuously litigated, All American contending that it had no knowledge of the unfair labor practice proceedings pending against Golden State, including the Order of the Board and the decision of the Court. However, none of the officers or officials of All American were called to support this contention. According to Schilling, who was completely familiar with the unfair labor practice proceedings both before and after the transfer and in fact handled them for Golden State as its representative on the Board of the Sacramento Bottlers' Association, he did not participate in the negotiations of the sale to All American and did not convey his knowledge to All American prior to the transfer. Of course, after the transfer his knowledge, as president and general manager of All American's division operating Pepsi Cola Bottling Company of Sacramento, was imputable to his superiors in All American. According to Crofoot, he handled all of the negotiations for the transfer with the representatives of All American and, although specifically asked, did not advise them of the pending unfair labor practice proceedings allegedly because he had no knowledge whatsoever thereof.

Unless otherwise corroborated or undisputed, I do not credit the testimony of either Schilling or Crofoot. Their willingness to sign letters and execute documents containing either false or misleading statements concealing or failing to disclose the sale of the Bottling Company to All American, including Schilling's execution of a letter and substitution of attorneys to the Court of

Appeals as "general manager of Golden State Bottling Company" more than 9 months after the termination of his connection with Golden State, his execution of a formal notice to employees, a certificate of posting thereof with delivery to the Board and an offer of reinstatement to Baker, as "president of Golden State doing business as Pepsi Cola Bottling Company of Sacramento" more than 10 months after his connection with Golden State ceased, Crofoot's verification on November 24, 1969 of an answer to the original Specification as "president of Golden State doing business as the Pepsi Cola Bottling Company of Sacramento" more than 21 months after Golden State had ceased doing business as such, including an allegation that on December 11, 1968 Golden State had offered Baker reinstatement to his former position, more than 10 months after Golden State had ceased doing business as the Pepsi Cola Bottling Company, as well as the subsequent execution by both of the answer on January 15, 1970 contrary to their prior positions, casts considerable doubt upon their reliability as witnesses. In addition, Crofoot and Schilling contradicted each other in several material respects.

Crofoot testified that he alone handled the negotiations, for the sale with All American, that Schilling did not participate, and that Crofoot had no recollection whatsoever of the pending unfair labor practice case, although the Board had decided the case in 1964, the Court had affirmed in 1965, and the case represented a potential substantial monetary liability. Crofoot further testified that, although specifically asked by All American concerning pending litigation, he did not inform its representatives of the pending unfair labor practice case because he did not recall it. Crofoot

tried to bolster his position by contending that Schilling handled all of the labor relations matters through the Sacramento Bottling Association, yet Crofoot admitted that he consulted with Schilling on a day-to-day basis about all matters involving the plant, that Schilling was not allowed to settle or dispose of legal matters without Crofoot's approval, and that he had to approve all unusual and excessive expenditures, which included the substantial assessments paid by Golden State to the Bottling Association for legal fees in connection with the unfair labor practice proceedings.

The sale contract contained a representation and warranty by Golden State that there were no actions, suits or proceedings pending against Golden State. In addition, Crofoot subsequently orally agreed to indemnify All American against any losses arising as a result of this proceeding. Patently as a result of such contractual provisions and Crofoot's contention that he did not advise All American of the pending proceeding, Crofoot and Schilling testified that Schilling did not participate in the negotiations and was unfamiliar with the terms of the contract. Nevertheless, Schilling executed the contract as secretary of Golden State, which contained a condition that he continue in the employ of All American as general manager for a period of at least 1 year at a monthly salary of $1500. Schilling admitted participating in the first negotiating session between Golden State and All American, and meeting on another occasion with officials of All American concerning his continuing as general manager. After the transfer Schilling admittedly had no authority over legal proceedings for All American and had to consult his superiors for authorization of any unusual expenditures. He admitted that he would consider any action by him contrary to

such instructions a negligent undertaking of his duties. He also admitted that after the transfer he was not authorized in any manner to represent Golden State. Yet he offered Baker alleged reinstatement, handled all contacts with Golden State's attorney, made the decision not to settle the backpay proceeding, involving at that time a claim in excess of $19,000, sent a substitution of attorneys to the Court, and issued the notices required by the Court's Decree all in the name of Golden State and all allegedly without ever advising All American of the pendency of these proceedings until a few days before the commencement of the hearings herein.

Patently, absent an establishable admission, only Golden State and/or All American would have knowledge whether All American knew of the pending unfair labor practice proceedings against Golden State prior to the transfer. No officials of All American were called to testify or deny that All American had such knowledge, nor was their failure to testify explained, which warrants an inference that had such testimony been elicited it would have been unfavorable to Respondents' position. Under all of the circumstances, I do not credit the testimony of Crofoot and Schilling that neither advised All American of the pending unfair labor practice proceedings prior to the transfer and sale. Moreover, such testimony tends only to establish a negative, and casts no light on whether All American received such information from other sources, including other officials of Golden State. A preponderance of the reliable, probative and substantial evidence in the entire record convinces me, and I find, that All American was a successor employer with knowledge at or before the time of the transfer of the pending unfair labor practice pro-

ceedings against Golden State, and accordingly is liable for Baker's reinstatement and is jointly and severally liable with Golden State for Baker's backpay.

D. Whether Baker Is Entitled to Reinstatement as a Distributor

The record establishes that Baker, who was discriminatorily discharged August 16, 1963, was Golden State's leading or top driver-salesman during the 14 months of his employment. All of the parties agree upon the computation of his gross backpay until October 1, 1964, based upon the fixed wages paid driver-salesmen, plus a computation of his commissions determined by multiplying the average commissions for that period by Baker's ratio or percentage of the average case sales of all of the drivers during his employment. On October 1, 1964, Respondent began converting its driver-salesmen to distributors, or independent contractors, by offering each of them, particularly those with the best sales records, contracts as distributors, or independent contractors, under the terms of which they realized net profits, after the deduction of their operating expenses, from the purchase of the products from Golden State and the resale to customers, as distinguished from the salary and commission previously paid them as driver-salesmen. In general, Golden State sold the distributors Pepsi Cola at a discount of 30 cents a case from the price at which they resold to the customers. Under this program Respondent enlarged the previous routes of the salesman by the addition of several high-volume stops, so that as distributors they could expect to realize greater net profits than their previous earnings as driver-salesmen, with the additional objective of an added incentive to increase their overall sales in order to increase their net income.

On October 1, 1964 Respondent selected Donald Thorne, who was then its best driver-salesman and had been third while Baker was employed, as the first driver-salesman to become a distributor. After a short period of experimentation with Thorne, at a meeting in early October, 1964 Schilling announced to the rest of the driver-salesmen Golden State's planned program of distributorships, advising them that each could convert to a distributorship if he wished and if not could remain as driver-salesman, that the distributor's routes would be somewhat expanded by the addition of several high-volume stops, that as distributors they could expect to earn more money than they had as driver-salesmen, and that each would have first refusal of his then route. Schilling informed the men that the larger volume routes would gradually be converted to distributorships and those who desired to remain driver-salesmen would be assigned low-volume city routes. Schilling invited each of the drivers to consult him after the meeting with respect to whether or not each wished to enter into a contract as a distributor under the proposal. During October three drivers in addition to Thorne were converted to distributors, two more during November, 1964, and two more in January, 1965. The second driver to become a distributor in October was Leonard Willeford, who had been assigned Baker's route after his discharge. The record establishes that Willeford was not as well qualified a driver-salesman as Baker. Substantially all of the driver-salesmen who became distributors retained the same routes, with several stops added to bolster volume.

Schilling, in an attempt to bolster Respondents' contention that Baker would not have been offered a distributorship, testified that Golden State did not offer all

of the driver-salesmen distributorships, but the driver-salesmen called as witnesses, whom I credit, testified, and I find, that Golden State offered all of the driver-salesmen an opportunity to convert to distributors if they so desired. Golden State was particularly interested in converting its large-volume routes and top driver-salesmen, of which Baker was number one while employed, to distributors. Golden State ultimately increased the number of its distributors to 12 before the sale to All American. All 12 assigned their contracts to All American and were continued by it as distributors. Schilling, whom I do not credit, testified that he would not have offered Baker a distributorship because he required constant supervision and thus could not have operated independently. Schilling's testimony with respect to Baker's qualifications contains several contradictions and evasions, and it must be recalled that it was Schilling who discriminatorily discharged Baker in 1963. Only one week before Baker's discharge Schilling had informed him that he was a good employee doing a good job. Schilling also told Willeford that Baker had done a good job. Golden State's own records establish that Baker was its top driver-salesmen. Quite clearly the same qualities which made Baker Golden State's top driver-salesman would have been enhanced by the added incentive of increased profits as a result of conversion to a distributor. The record establishes, and I find, that Baker, if he had not been discriminatorily discharged, would have been the first driver-salesman offered a distributorship instead of Thorne, who succeeded Baker as Golden State's number one driver-salesman. In addition, Willeford, who succeeded Baker on his route and was not as good a driver-salesman as Baker, was the second employee given a distributor-

ship, in early October, 1964. Baker testified, and it was undisputed, that he would have then accepted, and would now accept, a distributorship if offered.

Respondents contend that because their distributors are independent contractors, not employees, Baker is not entitled to reinstatement as a distributor under the Board's Order, but only to the job of a driver-salesman which he held at the time of his discharge. Respondents fail to distinguish the Board's remedial powers from protection of employees under the Act. As the General Counsel concedes, if Baker had been "discharged" while an independent contractor, clearly such discharge would not fall within the purview of the Act. However, it is well settled that employees who are unlawfully discharged are entitled to whatever promotions, increments and other benefits they would have received absent such unlawful discrimination, and that the Board is empowered to make such employees whole by ordering their "reinstatement" to that which they would have had but for the unlawful discrimination.[13]

The General Counsel also contends that Respondents' distributors were not in fact independent contractors, basing his argument upon the well established degree or right of control test. However, it is unnecessary to resolve this factually involved issue inasmuch as it is well established that the Board's remedial powers include authority to require a discriminatee's reinstatement to that which he would have had but for the dis-

---

[13] *International Union of Operating Engineers, Local 925 (J.L. Manta Inc., et al.)*, 180 NLRB No. 117 (1970); *Mooney Aircraft, Inc.*, 156 NLRB 326, enf'd 375 F.2d 402 (5th Cir. 1967); *Gainsville Publishing Company*, 150 NLRB 602 (1964); and *East Texas Steel Casting Company, Inc.*, 116 NLRB 1336, enf'd 255 F.2d 284 (5th Cir. 1958).

crimination. I am satisfied and find that under the Board's Order Baker is entitled to "reinstatement" as a distributor, an improved position which he would have had but for Golden State's discrimination against him.

E. *Method of Backpay Computation*

It has been found that but for his discharge Baker would have become a distributor on October 1, 1964. The parties are in agreement with respect to the computation of Baker's gross backpay until that date. The General Counsel contends that the most accurate and appropriate method available to compute Baker's gross backpay as a distributor after October 1, 1964 is by the use of the net profits, or earnings, of Thorne, the distributor most comparable to Baker. As found above, during Baker's employment he was the top salesman and Thorne ranked third. During the 14 months from July, 1962 through August, 1963, the records of case sales in evidence show that in monthly sales Baker ranked first four times, second five times and third five times, whereas Thorne's rankings varied from first to tenth. In overall sales Baker ranked first and Thorne third. If anything, as the General Counsel points out, the use of Thorne's net profits as the basis for computing Baker's gross backpay is more of a detriment to Baker than to Respondents, inasmuch as during Baker's tenure the ratio of his case sales to that of the average exceeded Thorne's ratio.

Respondents, assuming but not conceding that Baker would have become a distributor, contend that his gross backpay should be computed by multiplying the ratio of his sales while employed to the average (as to which the parties are in agreement), by the average case sales of all of the salesmen and distributors during the relevant period, to determine his estimated case sales as a

distributor, and in turn multiplying that by the average net profit per case of the five top distributors during 1968. Coincidentally or otherwise, the average net profit of the five top distributors during 1968 was substantially less than such average during 1965, 1966 or 1967. Because of Respondents' contention that the sale of the bottling business to All American terminated all liability of both Respondents for reinstatement and backpay, Respondents' alternative computations did not proceed beyond January 31, 1968, the date of the sale.

It is well established that the use of a comparable employee's earnings as a basis for computing a discriminatee's gross backpay is appropriate, particularly where it demonstrably results in no monetary detriment to a respondent. Here the use of Thorne's net profits as the distributor most nearly comparable to Baker results in a built-in bias in favor of Respondents because of Baker's undisputed superior sales record. The record establishes, as computed by Respondents and subsequently accepted by the General Counsel, that the ratio of Baker's case sales while employed to the mean case sales per man was 125.6 percent. An independent computation by me from the figures available in the record reveals that Thorne's ratio to the mean for the same period of time was 117.1 percent. Respondents' computation of Baker's estimated case sales, plus calendar 1968 which was computed by me because of Respondents' failure to do so, both based upon the average case sales per quarter for the relevant period multiplied by Baker's established ratio, result in estimated case sales by Baker substantially below those made by Thorne during the same relevant period, with the exception of 1966 and 1967. In addition, Respondents use of the average net profit per case of the five top

distributors for the year 1968, substantially the lowest of the 4 years involved, caused an even greater disparity in Baker's estimated profits vis-a-vis Thorne's net profits.[13]

Respondents suggest no reason why Baker's estimated gross backpay should be based upon the average of all case sales by driver-salesmen and distributors, increased by Baker's prior ratio, multiplied by the average net profit of the top five distributors during 1968, instead of the sales and net profits of Thorne, admittedly the top salesman and distributor after Baker's discharge. As noted above, even the use of Thorne's net profits to calculate Baker's gross backpay results in some bias in favor of Respondents, and the use of their formula would substantially increase such distortion in their favor. I am satisfied and find that the use of Thorne's net profits as a method of calculating Baker's gross backpay after October 1, 1964 was both appropriate and reasonable, and the most accurate method available short of involved calculations to eliminate the slight bias favoring Respondents.[14]

---

[13]The 1968 average net profit per case used by Respondents was $.1837. Independent calculations reveal that the average net profit per case of the top five distributors from 1965 through 1968 was $.2057, and that Thorne's average net profit per case for the same 4 years was $.2112. Other calculations reveal that, coincidentally, the average case sales for the top five distributors during the fourth quarter of 1964 and the same 4 years are substantially the same as the average of all case sales multiplied by Baker's established ratio, the formula employed by Respondents. Except for 1966 and 1967, they too are substantially below Thorne's case sales for the same period of time. The use of such estimated case sales plus the use of either lower average net profit per case would result in substantially lower gross backpay than that based upon Thorne's net profits.

[14]It could, for example, be argued that Thorne's net profits should be multiplied by 107.2 percent, Baker's prior ratio of sales expressed as a percentage of Thorne's prior ratio of sales.

F. *Respondents' Alleged Offer of Reinstatement*

Respondents' answer to the Supplemental Specification, prepared by the same attorney and verified by the same officer of Golden State as its original answer, did not allege that either Respondent had offered Baker reinstatement, unlike Golden State's answer to the original Specification, which alleged that it had offered Baker reinstatement to his former position on December 11, 1968. Despite the failure of Respondents' answer to so allege, Respondents contend in their brief that on December 11, 1968 Baker was offered reinstatement to his former position as a driver-salesman. Respondents' brief refrains from indicating whether such offer was made by Golden State or All American. As hereinabove found, pursuant to the Court Decree and the subsequent request of the Regional Director, on December 11, 1968, Schilling posted the required notice and sent the Board a certificate of such posting, both signed by him as the "president of Golden State," and the same day, as also required by the Court Decree, sent Baker an offer of reinstatement to his former job as a route driver, again signing as "president" of the Pepsi Cola Bottling Company, with copies to Jackson and the Board. Schilling admitted, and it is undisputed, that his connection with Golden State had terminated more than 10 months previously, and that he had no authority whatsoever to represent Golden State thereafter.

The record establishes beyond dispute, Schilling admitted, and Respondents' brief in effect contends, that he made this "offer" on behalf of Golden State. Clearly such offer was *ultra vires*, void and a nullity. Not only

did Schilling have no such authority, but Golden State had no such job, having sold the bottling business on January 31, 1968. Schilling signed and sent to the Board all of the contemporary documents required by the Decree as the "president" of Golden State.[15]

Moreover, the General Counsel contends that such "offer" was not in compliance with the Board's Order, inasmuch as Baker was entitled to "reinstatement" as a distributor, the position which he would have had but for Golden State's discrimination, the "offer" was only for a job as driver-salesman, would not make Baker whole, and thus was invalid. I have found hereinabove that under the Board's Order Baker was entitled to "reinstatement" as a distributor, for the reasons there explicated. I conclude and find that Baker was never given a valid offer of reinstatement to the position which he would have had but for the discrimination, and accordingly that liability for backpay continues to run.

G. *Backpay Calculations*

As hereinabove found, there was no dispute with respect to the computation of Baker's gross backpay until October 1, 1964, when it has been found he would have become a distributor. The General Counsel substituted Respondents' Exhibit A for his Appendix A of the Specification and thus the parties agreed that the ratio of Baker's case sales to the overall mean was 125.6 percent, which ratio was used by all to compute the commissions Baker would have earned as a driver-

[15]If, on the other hand, it be contended that Schilling signed on behalf of All American, contrary to the facts and from which Respondents' brief refrains, the notice and letter constituted a public admission that All American would offer Baker full reinstatement and make him whole for any loss of pay.

salesman until October 1, 1964, the base pay of driver-salesmen being undisputed. General Counsel's Exhibit 2, received in substitution for Appendix B of the Specification, calculated Baker's quarterly gross backpay from August 24, 1963[16] through the third quarter of 1964 upon such basis, agreed to by Respondents with the correction of a minor error of $5 in the calculation of the first partial quarter, as the result of failing to prorate the allowance for uniforms for such partial quarter. Thus the parties agreed that Baker's total gross backpay as corrected for the period ending with the third quarter of 1964 was $7,208.

Beginning with the fourth quarter of 1964, it has been found that an appropriate method of projecting Baker's gross backpay consisted of Thorne's net profits, which are available in the record through 1968. Respondents' calculations after the third quarter of 1964 do not correspond with those of the General Counsel, because of their contention, heretofore considered and found without merit, that if Baker would have become a distributor his gross backpay should be computed upon the average case sales multiplied by his ratio of sales prior to his discharge. General Counsel's Exhibit 3, substituted for Appendix C-1 of the Specifications, calculates Baker's gross backpay from the fourth quarter of 1964 to and including the fourth quarter of 1968. With respect to the fourth quarter of 1964, Respondents stipulated that Thorne's net profits, set forth in General Counsel's Exhibit 3 as Baker's gross backpay for that period, were accurately derived from Thorne's federal tax returns, without conceding their position

[16]Because Baker, terminated August 16, 1963, was given 1 week's vacation pay.

with respect to the use of Thorne's net profits in calculating Baker's gross backpay. The accuracy of the calculations set forth in General Counsel's Exhibit 3 are not challenged or disputed and result in gross backpay total from the fourth quarter of 1964 through 1968 of $52,285.

Appendix D of the Specification calculates Baker's net interim earnings, i.e., his interim earnings less necessary expenses incurred in obtaining and retaining interim employment, from the third quarter of 1963 through the second quarter of 1969. The accuracy of such calculation is undisputed. General Counsel's Exhibit 4, received in substitution for Appendix E-1, calculates the resulting net backpay from the third quarter of 1963 through 1968 by subtracting the net interim earnings from the gross backpay, resulting in a net backpay total of $16,497 (with the correction of the minor error in the calculation of gross backpay for the third quarter of 1963). The accuracy of these calculations is not challenged. Because of the unavailability at the time of the hearing of Thorne's net profits for calendar 1969, the Supplemental Specification estimated Thorne's net profits for the first two quarters of 1969 in order to estimate Baker's gross and net backpay for the same period of time, his net interim earnings being available in Appendix D. Inasmuch as it has been found above that Baker has not been offered reinstatement as required by the Board's Order, and that backpay continues to run until such offer has been made, it will be necessary hereafter to calculate Baker's net backpay for all of 1969 and whatever subsequent period in 1970 and thereafter may run until Respondents comply with the Board's Order.

Accordingly it would appear unnecessary and inappropriate at this time to base Baker's gross and net bakpay for the first two quarters of 1969 upon estimates derived from averaging Thorne's net profits for the corresponding quarters of 1965 through 1968. The calculations so estimating Baker's gross and net backpay are set forth in General Counsel's Exhibit 24 and 25, received in substitution for Appendixes C-1 and E-2. Admittedly they result in an estimate. Inasmuch as it will be necessary hereafter to calculate backpay until Baker is offered reinstatement, I find it appropriate to defer such calculations until Thorne's actual net profits are available, and accordingly terminate the calculation of interim backpay herein with the last quarter of 1968.

The following tabulation summarizes the above calculations:

Calendar Quarter	Gross Backpay	Net Interim Earnings	Net Backpay
1963-3	673	659	14
1963-4	1602	1630	-
1964-1	1582	1526	56
1964-2	1629	1619	10
1964-3	1722	1635	87
1964-4	2700	2101	599
1965-1	2412	1586	826
1965-2	2927	1621	1306
1965-3	3269	2056	1213
1965-4	2824	2096	728
1966-1	2838	1660	1178
1966-2	3201	1800	1401
1966-3	3359	2388	971
1966-4	2728	2280	448
1967-1	2708	1755	953
1967-2	3027	2015	1012
1967-3	3406	2087	1319
1967-4	2685	2512	173
1968-1	3081	2080	1001
1968-2	3891	2450	1441
1968-3	4076	2551	1525
1968-4	3153	2917	236
		Total Net Backpay	16,497

H. *Conclusions and Recommendations*

It is concluded and found that the net amount of backpay due to Baker for the period from the date of his discharge, August 16, 1963, to December 31, 1968, is $16,497, plus interest at the rate of 6 percent per annum on each quarterly amount as provided in the Board Order and Court Decree, less any tax withholding required by law, plus such further amounts of backpay as have or may hereafter accrue from January 1, 1969 to the date of a valid offer of reinstatement to Baker by All American.[17]

Upon the basis of the foregoing findings and conclusions and upon the entire record in this case, I recommend that the Board issue the following:

ORDER

Respondent Golden State Bottling Company,, Inc. and Respondent All American Beverages, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento, and their officers, agents, successors and assigns, shall jointly or severally pay to Kenneth L. Baker the sum of $16,497, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law, as net backpay due under the Board Order and Court Decree for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969 to the date of a valid offer of reinstatement to Baker, plus interest at the rate of 6 percent per annum computed in the manner provided herein, less any tax withholding required by law.

Dated: July 13, 1970.

/s/ Robert L. Piper
Robert L. Piper
Trial Examiner

---

[17] *Tennessee Packers, Inc.*, 152 NLRB 1315 (1965).

APPENDIX A

Page	Line	Correction
Title Page	21	Change "Kumbler" to "Kumler"
2	4	Change "Krofoot" to "Crofoot"
12	19	Change "Appendix D" to "Appendix B"
18	2 and 11	Change "$16,528" to "$16,502"
21	2	Change "or each driver sales" to "for each driver-salesman"
24	17	Change "there will probably be" to "these would properly be"
30	19	Change "C's in" to "C's as in"
35	6	Change "violation" to "no violation"
35	8	Change "relevant" to "not relevant"
36	6	Change "bagging" to "begging"
44	15	Change "Krofoot" to "Crofoot"
45	7	Change "Krofoot" to "Crofoot"
53	7	Change "Krofoot" to "Crofoot"
54	24	Change "Krofoot" to "Crofoot"
57	10 and 23	Change "Krofoot" to "Crofoot"
58	9	Change "Krofoot" to "Crofoot"
67	12	Change "inquire" to "acquire"
88	4	Change "as" to "and"
88	13	Change "receive" to "proceed"
88	16	Change "resident" to "President"
90	6, 7 and 8	Change "vote" to "boat"
101	2	Change "released" to "replaced"
105	24	Change "displays" to "space"
111	23	Change "Kumbler" to "Kumler"
121	5	Change "Ralle's group" to "Mraule's route"
121	9	Change "Ralle R-a-l-l-e" to "Mraule M-r-a-u-l-e"

Page	Line	Correction
121	10	Change "Ralle" to "Mraule"
130	12	Change "that I answered" to "in answer to"
143	7	Change "Hodse and Kumbler" to "Hodge and Kumler"
154	10	Change "James" to "Gene"
157	17	Change "in the corporation" to "of incorporation"
160	2	Change "dispursement" to "disbursement"
161	24	Change "hndle" to "handle"
180	12	Change "September" to "December"
182	12 and 22	Change "Jackson" to "Barton"
191	11	Change "rules" to "route"
196	4	Change "11" to "1100"
200	13	Change "group" to "route"
209	10	Change "private" to "pilot"
211	6	Change "Can you tell me" to "Did you tell him"
213	17	Change "euql" to "equal"
223	23	Change "seek" to "week"
228	3	Change "dreived" to "derived"
234	3	Change "Why?" to "How?"
243	21	Change "Apendic" to "Appendix"
254	14	Change "accounts" to "accountants"
260	2	Change "with" to "wit"

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1290.

All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1324.

On Petition for Review and Cross-Applications for Enforcement of a Supplemental Order of the National Labor Relations Board.

Before: CHAMBERS, BROWNING, and KILKENNY, Circuit Judges PER CURIAM:

Golden State owned and operated the Pepsi-Cola Bottling Company of Sacramento. In 1964 the Board found that in the preceding year Golden State had violated sections 8(a)(3) and (1) of the Act by discriminatorily discharging one of its employees, Kenneth L. Baker, a driver-salesman. The Board ordered Golden State to offer Baker reinstatement and make him whole for any loss of earnings from the date of discharge to the date of reinstatement. We upheld the Board's order. *NLRB v. Golden State Bottling Co.*, 353 F.2d 667 (9th Cir. 1965). In 1968, with the controversy not yet resolved by compliance with the order, Golden State sold Pepsi-Cola Bottling to All American. In 1969 the Board issued a supplemental order imposing liability upon both Golden State and All American for

back pay found to be due Baker for periods before and after the 1968 sale. Both companies challenge the order; the Board seeks enforcement.

1. All American argues that it is not liable for back pay accruing before or after the acquisition. We disagree. Pepsi of Sacramento was a self-contained, going operation. No change was made in either managerial or supervisory personnel as a result of the sale. All but two or three of the approximately 50 employees of Pepsi were retained under All American's ownership. All of the 12 distributors who handled the products under contract continued with All American. The product remained the same, the customers remained the same, and there was no cessation or change in the method of operation of the plant. The chief executive of the Pepsi operation, Eugene B. Schilling, held the same post before and after the sale. This and other evidence offered substantial support for the Board's finding that All American purchased Pepsi with knowledge of the unfair labor practice litigation. On this record it was proper for the Board to hold All American responsible for remedying violations of the Act committed by its predecessor. *United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. v. NLRB*, 442 F.2d 1180, 1183 (9th Cir. 1971); *Perma Vinyl Corp.*, 164 NLRB 968 (1967), *enforced sub nom. United States Pipe & Foundry v. NLRB*, 398 F.2d 544 (5th Cir. 1968). *See generally*, Du Ross, Protecting Employee Remedial Rights under the Perma Vinyl Doctrine, 39 Geo. Wash. L. Rev. 1063 (1971).

2. We do not consider whether the Board properly held Golden State liable for post-acquisition lost wages.

Golden State agreed to indemnify All American for any liability imposed upon All American for back pay, and we have upheld the Board's imposition of such liability upon All American for the post-acquisition period. Accordingly, Golden State concedes that it is liable for such wages by virtue of its agreement, whether or not it would also be liable absent that agreement.

3. Pepsi converted most of its driver positions to distributorships in October 1964. Petitioners argue that this change ended their liability to Baker because distributors are "independent contractors" excluded from the coverage of the Act by 29 U.S.C. § 152(3). However, it is undisputed that when Baker was discriminatorily discharged he was an ordinary employee. The Act's remedies are not thwarted by the fact that an employee who is within the Act's protections when the discrimination occurs would have been promoted or transferred to a position not covered by the Act if he had not been discriminated against. *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 236-37 (2d Cir. 1953).

4. The offer to reinstate Baker as a driver-salesman did not end liability for back pay. The Board found upon ample evidence that Baker would have become a distributor but for his unlawful discharge. According to petitioners' own testimony, a distributorship would have involved more income. It was therefore not sufficient to offer Baker reinstatement as a driver-salesman. That position would have been "non-equivalent employment the acceptance of which would have deprived [Baker] of the very [right that was] violated by the em-

ployer." *Bon Hennings Logging Co. v. NLRB*, 308 F.2d 548, 557 (9th Cir. 1962).

5. Having found that the unlawfully discharged employee was Pepsi's most successful driver-salesman before termination, and that he would have been given a distributorship but for the discriminatory discharge, it was proper for the Board to conclude that the goal of complete compensation would be most nearly achieved by computing Baker's losses on the basis of the profits of the most successful distributor. As we recently said, "The Board has wide discretion in selecting criteria for reconstructing what would have happened in a given case but for the discrimination." *NLRB v. Superior Roofing Co.*, ... F.2d ..... (9th Cir. May 4, 1972).

We have examined petitioners' other objections to the method of computation and the use of profits in determining the amount of the award. The Board's decision "can fairly be said to effectuate the policies of the Act," *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), and is certainly not "arbitrary or unreasonable in the circumstances involved." *NLRB v. Brown & Root*, 311 F.2d 447, 452 (8th Cir. 1963).

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento v. National Labor Relations Board, No. 71-1290. All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento v. National Labor Relations Board, No. 71-1324.

KILKENNY, Dissenting:

I would not extend the *Perma Vinyl* doctrine to apply to the facts on the record before us. *NLRB v. Burns Security Services,* ..... U.S. ..... (May 15, 1972) and *Brown v. NLRB,* ..... F.2d ..... (CA9, June 12, 1972), in my opinion, are applicable to our facts and require us to deny enforcement of the Board's supplemental order.

APPENDIX C.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1290.

All American Beverages, Inc., d/b/a Pepsi-Cola Bottling Company of Sacramento, Petitioner, v. National Labor Relations Board, Respondent. No. 71-1324.

Before: CHAMBERS, BROWNING, and KILKENNY, Circuit Judges.

THIS CUASE came on to be heard upon petitions for review, and on cross-applications for enforcement of, a supplemental order of the National Labor Relations Board issued on January 21, 1971, against Golden State Bottling Company, Inc., formerly d/b/a Pepsi-Cola Bottling Company of Sacramento, and All American Beverages, Inc. d/b/a Pepsi-Cola Bottling Co. of Sacramento, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on June 13, 1972, and has considered the briefs and transcript of record filed in this cause. On August 21, 1972, the Court being fully advised in the premises, handed down its decision denying the petitions for review and granting enforcement of the Board's supplemental order. In conformity therewith, it is hereby

ORDERED AND JUDGED by the Court that:

Petitioner Golden State Bottling Company, Inc., and Petitioner All American Beverages, Inc., d/b/a Pepsi Cola Bottling Company of Sacramento, and their officers, agents, successors and assigns, shall jointly or severally pay to Kenneth L. Baker "the sum of $16,497, with interest at the rate of 6 percent per annum computed on the basis of the quarterly amounts of net backpay due, less any tax withholding required by law, as net backpay due under the Board Order and Court Decree for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969 to the date of a valid offer of reinstatement to Baker, plus interest at the rate of 6 percent per annum" computed in the manner provided in the Trial Examiner's Decision, less any tax withholding required by law.

Enforced, Judgment Filed and Entered
/s/ William B. Luck
William B. Luck
Clerk

A TRUE COPY,

ATTEST:
William B. Luck
Clerk

APPENDIX D.

Fifth Amendment to the United States Constitution.

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, as Amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151 Et Seq.):

"SECTION 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

"SECTION 2(3). The term 'employee' shall include any employee, and shall not be limited to the

employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

"SECTION 7. Employee shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

"SECTION 8. (a) (1) and (3) It shall be an unfair labor practice for an employer . . .

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization . . ."

"SECTION 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure

for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

"SECTION 10(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an

order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

"SECTION 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeal to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall file in the court the record in the proceedings, as provided in Section 2112 of title 28, United States Code . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if

application is made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Section 1254 of title 28.

"Section 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to be Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Federal Rules of Civil Procedure 65(d):

(d) *Form and Scope of Injunction or Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.